LE COPY

Office-Supreme Court, U.S.
FILED
DEC 19 1958
JAMES R. BROWNING, Clerk

No. 527

In the Supreme Court of the United States

OCTOBER TERM, 1958

J. MYER SCHINE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
VICTOR R. HANSEN,
Assistant Attorney General,
DANIEL M. FRIEDMAN,
HENRY GELLER,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
1. Background of the district court's decision	3
2. The district court's findings and conclusions	5
3. The decision of the court of appeals	6
Argument	8
Conclusion	13

CITATIONS

Cases:	
Kansas City Star Co. v. *United States*, 240 F. 2d 643, certiorari denied, 354 U. S. 923	9
O'Malley v. *United States*, 128 F. 2d 676, reversed on other grounds, 317 U. S. 412	10
Schine Chain Theatres v. *United States*, 334 U. S. 110	3
United States v. *Johnson*, 165 F. 2d 42	9
United States v. *Schine Chain Theatres*, 63 F. Supp. 229	3
Statute:	
18 U. S. C. 401	2

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 527

J. MYER SCHINE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 11–32) is as yet unreported. The district court's findings of fact and conclusions of law are set out at pages 30–49 in the appendix to appellants' brief in the court below.[1]

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1958 (Pet. 33–34). The petition for a writ of certiorari was filed on November 19, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

[1] This appendix is cited herein as "App. ——"; references to the Government's appendix to its brief in the court below are denoted "G. App. ——."

QUESTIONS PRESENTED

Under a consent judgment in a Government antitrust case, the owners and operators of a large chain of motion picture theatres were required to divest certain theatres by specified dates, and to end various anticompetitive business practices. The time for accomplishing divestiture was subsequently extended by a consent order. Petitioners were found guilty of criminal contempt for wilful violations of the decree. The following questions are presented:

1. Whether the court of appeals correctly held that, in the circumstances of this case, the order extending the time for divestiture did not constitute a forgiveness of wilful failure to divest and other contempts committed prior thereto, and did not bar consideration of acts prior thereto as a basis for the contempt convictions.

2. Whether the district court's finding that petitioners had wilfully disobeyed the decree by failing to divest theatres is supported by substantial evidence.

3. Whether the court of appeals correctly held that any error resulting from the trial court's refusal to permit a witness to state his conclusory opinion was harmless.

STATUTE INVOLVED

18 U. S. C. 401, provides, in pertinent part, as follows:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> * * * * *

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command.

STATEMENT

On March 10, 1954, the District Court for the Western District of New York issued an order directing petitioners to show cause why they should not be held in criminal contempt for wilfully violating an antitrust consent decree, entered on June 24, 1949, after a trial on the merits (App. 49–51). After trial, the court found that petitioners had wilfully and contumaciously violated the decree (App. 4–5), and imposed fines totalling $73,000 (App. 5–14). The Court of Appeals for the Second Circuit (one judge dissenting in part) affirmed.

1. BACKGROUND OF THE DISTRICT COURT'S DECISION

In 1945, the district court, after trial, held that the owners and operators (individuals and corporations) of a large chain of motion picture theatres had violated the Sherman Act by conspiring to restrain and monopolize trade in motion picture exhibition. *United States* v. *Schine Chain Theatres*, 63 F. Supp. 229. It enjoined various anticompetitive practices, and required divestiture of a large number of theatres. On appeal, this Court affirmed most of the findings of violation, but remanded the case to the district court for further findings with respect to divestiture. *Schine Chain Theatres* v. *United States*, 334 U. S. 110.

On remand, a final decree was entered on June 24, 1949, on consent of the parties (App. 82–95). The decree, in pertinent part, ordered the defendants to

dispose within three years of all their interests in 33 specified theatre properties to persons who would use them as motion picture theatres, and to dissolve certain pooling arrangements; prohibited them from acquiring any additional theatres without the consent of the court, or from buying and booking films for theatres not owned by them; and enjoined them from continuing any conspiracy which had the purpose or effect of maintaining their local theatre monopolies or of preventing others from competing with them (*ibid.*).

The defendants were directed to accomplish not less than one-third of the divestitures by June 24, 1950, and not less than two-thirds by June 24, 1951 (App. 88). The time for accomplishing divestiture was extended by a series of consent orders, and on January 22, 1952, the court entered, on consent, the so-called "extension order," *nunc pro tunc* December 17, 1951, which gave the defendants until June 24, 1953, to complete divestiture, on condition that they disposed of at least one-third of their theatres by June 24, 1952, and at least two-thirds by December 24, 1952 (App. 95–100).

After investigation in late 1953 (G. App. 103–105), the Government filed its petition for the show cause order, and the order was issued on March 10, 1954. As of that date, the defendants had disposed of only two of the 25 theatres which were still to be divested at the time the extension order was entered (Fdg. 26, App. 40).[2]

[2] During the entire period (June 24, 1949–March 10, 1954), Schine Circuit sold for theatrical use only seven of the 33

2. THE DISTRICT COURT'S FINDINGS AND CONCLUSIONS

The district court, after trial, found (App. 45–47) that petitioners "wilfully and contumaciously" had violated the decree within the period of the statute of limitations in the following respects:

a. They acquired and operated theatres without the consent of the court, and continued to perform a pooling arrangement and a buying and booking arrangement, both expressly forbidden by the decree (Concls. 7–9, App. 46–47). These violations, the court held, were committed through the use of three family corporations which, although ostensibly independent, were in fact controlled exclusively by petitioner J. Myer Schine and his brother (*ibid.*; App. 36, 38, 40–41, 44).

b. They deliberately failed to carry out the divestiture requirements of the decree (Concl. 6, App. 46). For the purpose of discouraging prospective purchasers and preventing divestiture, they failed to offer certain theatres for sale or to supply adequate information with respect to the theatres, set unreasonably high prices, discouraged efforts by brokers to negotiate dispositions, refused to consider leasing of theatres, etc. (Fdg. 24, App. 39).

---

theatres required to be divested for theatrical use; the district court found that one sale was "fictitious" and a "fraud" on the court, while two other theatres were subsequently reacquired by family corporations controlled by the Schines (Fdgs. 23–25, App. 38–40).

Two of the defendants in the antitrust suit have died (App. 44). Petitioners are the remaining defendants and four additional parties who were found to have knowingly participated in the violations of the decree (App. 33–35, 44, 45–47, 57).

c. They participated in licensing arrangements which discriminated against competing theatres (Concl. 10, App. 47).

d. They continued the prior conspiracy to maintain Schine's theatre monopolies in various towns (Concl. 5, App. 45–46).

The court, which had permitted petitioners to adduce the evidence they deemed appropriate on the effect of the extension order of January 22, 1952 (App. 135–137, 505, 507–566),[1] concluded that the order neither "settle[d nor] compromise[d]" the matters then in dispute, nor barred the Government from asserting, as a basis for criminal contempt, acts performed prior thereto (Concl. 3, App. 45).

3. THE DECISION OF THE COURT OF APPEALS

The court of appeals, in a comprehensive opinion by Chief Judge Clark (Judge Moore dissenting in part), affirmed petitioners' convictions. It stated (Pet. 20) that the "issues appear to us to be factual in nature," and that the trial court's "findings are in accord with the evidence." The court ruled (Pet. 14) that the district court's findings that petitioners "willfully disobeyed the divestiture provisions of the decree * * * are amply supported by the evidence"; that

[1] Although petitioners contend (Pet. 6) that the trial court "erred in excluding testimony of the negotiations leading up to the amendment of the Consent Decree on January 22, 1952, which evidence had been offered for the purpose of enabling the Court to determine the matters that had been settled and concluded by the entry of the Extension Order," the trial court actually received all the evidence which petitioners offered on this issue. See text, *supra*.

the finding that petitioners "continued the original conspiracy is certainly justified by the evidence," which "shows not isolated instances of violation, but a conscious and continuous scheme to thwart the court's decree" (Pet. 17); and that, except for one finding involving a charge of "only minor importance," the reversal of which "does not justify upsetting the fines entered against the respondents" (Pet. 16), the court's other findings of violation similarly were supported by the record.

The court rejected petitioners' argument that the 1952 extension order constituted an implicit forgiveness of any prior contempts of the original decree and is *res judicata* against the Government. It ruled (Pet. 19–20) that the order "on its face accomplishes no more than to extend the time during which the respondents could make the necessary sales and still be in compliance with the decree"; and that, in any event, an agreement between the parties could not preclude the court from vindicating its authority by a criminal contempt proceeding.

Judge Moore agreed that the petitioners had "contemned the decree by acquiring interests in theatres without court approval, by buying and booking pictures for theatres not owned by them, and by continuing the [forbidden] pool" (Pet. 30–31). However, it was his view that further proof should have been taken as to possible matters compromised by the extension order; that the finding of wilful failure to divest was unsupported; and that three of the peti-

tioners who had not been parties to the original judgment had been incorrectly convicted (Pet. 20–30, 32).

ARGUMENT

Contrary to petitioners' contention (Pet. 8), this case presents no "important questions of Federal antitrust law." Although petitioners refer (*ibid.*) to the settlement of problems under consent decrees by "negotiations between the Department of Justice and the affected parties," the questions actually presented (Pet. 2) involve only factual or evidentiary issues turning on the particular facts of this case. We submit that the court of appeals correctly resolved these questions, and that there is no need for further review.

1. Petitioners' main contention (Pet. 9) is that the extension order of January 22, 1952, constituted a settlement of all matters in dispute between the parties and therefore precluded consideration of acts prior to January 22, 1952. But the court below properly rejected this argument as contrary to fact and law (Pet. 19–20).

---

[5] Petitioners also contend (Pet. 9) that the district court improperly relied on acts prior to the original consent decree and the statutory period of limitations. But, as the court of appeals pointed out (Pet. 15–16), although the initial acts in contempt of the decree occurred prior to the statutory period, the "illegal" conditions which they created (such as acquisition and operation of additional theatres, performance of pooling and buying and booking arrangements, failure to divest) "continued up to the date of the order to show cause and resulted in what might be called 'continuing contempts'". In any event, evidence concerning activities prior to the limitations period was admissible, in order to obtain the necessary background against

As the court pointed out (Pet. 19), the order "on its face" simply "extend[s] the time" for accomplishing divestiture (App. 95–100, Pet. 19); it also "tightens" the original decree in certain respects (*e. g.*, clause 5, App. 96–97, 574–575). It makes no reference to the alleged forgiveness for past violations, and neither Government counsel nor counsel for petitioners mentioned any such concession in presenting the order to the district court (App. 639–644). At most, therefore, the only matter involved in the contempt case that could have been "settled" by the extension order was the failure to divest within the time specified in the original decree. As shown by overt acts (Pet. 14), the wilful failure to divest continued throughout the remainder of the statutory period (1952–1954), and that violation was in no sense "forgiven" by the 1952 extension order.

The negotiations leading to the extension order were fully explored at the trial by petitioners and the Government (App. 507–600). The evidence shows that, except for discussing the general question of divestiture, there was no consideration in those negotiations of the violations of the decree which the court found constituted contempt (App. 568–596; see, also, App. 346–370). The Government official in charge of the negotiations denied that there had been any "forgiveness" even of matters then in dispute (App.

---

which to appraise petitioners' intent and their acts committed during the statutory period. Pet. 14; *Kansas City Star Co.* v. *United States*, 240 F. 2d 643, 650–51 (C. A. 8), certiorari denied, 354 U. S. 923; *United States* v. *Johnson*, 165 F. 2d 12, 15 (C. A. 3).

568–569, 587).[6] Indeed, the Government did not obtain evidence of petitioners' concealed activities until the instant proceeding (G. App. 103–105; cf. App. 564–565, 584).[7] The evidence thus fully supports the finding that no "forgiveness" or "settlement" was intended by the extension order.

Finally, the court of appeals correctly held that, even assuming *arguendo* that "Justice Department officials entered into a private settlement agreement * * *, such an agreement does not operate as a defense to this action," "since the purpose of a proceeding in criminal contempt is to vindicate the authority of the court, *Gompers* v. *Buck's Stove & Range Co.*, * * * 221 U. S. 418, 441 * * *." Pet. 19–20; see *O'Malley* v. *United States*, 128 F. 2d 676, 685 (C. A. 8), reversed on other grounds, 317 U. S. 412. Inasmuch as the court was not privy to any alleged "settlement," it did not lose its power to deal with wilful violations of its orders committed within the limitations period.

2. Petitioners also attack the finding that they wilfully failed to dispose of the theatres which were required to be divested under the decree (Pet. 2, 9).

[6] One of the petitioners had testified that this official offered such "forgiveness" (App. 535). In the circumstances (see text above), the trial judge, who observed the demeanor of both witnesses on the stand, was fully justified in rejecting the self-serving testimony of petitioners' witness, and in concluding to the contrary.

[7] Indeed, with one exception (Concl. 9, App. 46–47), all of the findings of contempt rested on acts and conduct which occurred or continued after January 22, 1952. Therefore, even assuming the correctness of petitioners' claim, the court's findings of contempt would not thereby be invalidated.

They state that there is no evidence that they rejected any reasonable offer for any theatre; and they contend that they failed to divest the theatres because there was no market for them due to the deterioration of the four-wall theatre business from 1951 to 1954.

We submit that these contentions are fully answered by the following statement of the court of appeals, not challenged here (Pet. 14):

> The district court found that these respondents resisted the divestiture provisions by omitting certain theatres from their published advertisements and offers to sell, by ignoring and discouraging inquiries from brokers and prospective purchasers, and by refusing to provide prospective purchasers with theatre operating figures. All of these findings are amply supported by the evidence. * * *

These findings establish that petitioners wilfully failed to carry out the decree's divestiture requirements. Since the case is one of criminal contempt, petitioners cannot now justify such wilful failure on the ground that if they had attempted properly to comply, they would have failed. Thus, even if petitioners' claim that there was no theatre market were accepted, the court's findings of criminal contempt still would stand.[8]

---

[8] Petitioners' argument that they never rejected a reasonable offer is similarly defective. They were under an affirmative obligation to divest the theatres. Furthermore, reasonable offers cannot be expected when the seller does not list the property for sale, refuses to supply necessary information upon which a reasonable offer can be made, or establishes unreasonably high prices.

The record, moreover, establishes that the market, while depressed, still existed. As the court of appeals correctly held (Pet. 15), "* * * this finding is supported by the Government's evidence of sales of similar theatres by other exhibitors during this same period." To give but one example, American Broadcasting-Paramount Theatres, under a judgment entered in March 1949, sold (or in a few cases leased) all but 16 out of about 200 wholly owned theatres, a great many of which were located in smaller cities and all except one of which were sold for use as theatres (App. 450–452, 464).

3. Petitioners also assert (Pet. 2, 6), although they do not argue the point, that the trial court committed prejudical error in not permitting their witness, Berk, to state his ultimate opinion as to whether there was a market for the Schine theatres (see App. 216–217). But Berk had testified at considerable length that because "the bottom fell out of the sale of theatres, and the value of theatres" (App. 212), no one could have sold theatres for theatrical purposes (App. 212–228; and see Fdg. 32, App. 42).* In the circumstances, the court of appeals properly held (Pet. 15) that "the error, if any, * * * was harmless, for the statement called for was only conclusory and the witness had testified fully to the facts from which the conclusion could have been inferred."

---

*The evidence showed, however, that during this period other motion picture exhibitors, under similar divestiture orders, had sold a substantial number of theatres for theatrical use. See text, above; App. 466–467, 480–481.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
VICTOR R. HANSEN,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
HENRY GELLER,
Attorneys.

DECEMBER 1958.

U. S. GOVERNMENT PRINTING OFFICE: 1958